

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 318 of 2015

STATE

V

AMINISITAI NAVUNIVESI

Counsel : Ms. Shyamala Alagendra with Ms. Susan Serukai for the State
Mr. Lisiata Qetaki for the Accused

Dates of Trial : 10-14 & 17-20 September 2018

Summing Up : 21 September 2018

Judgment : 25 September 2018

Sentence : 5 October 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "MA".

SENTENCE

[1] Aminisitai Navunivesi, as per the Amended Information, filed in Court on 17 September 2018, you were charged with the following offences:

FIRST COUNT

Representative Count

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) of the Crimes Act 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of January 2012 and the 31st day of December 2012, at Naiqarakoka Settlement, Tailevu in the Central Division, with intent to insult the modesty of M.A., exposed his penis.

SECOND COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of M.A., a child under the age of 13 years.

THIRD COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of M.A., a child under the age of 13 years, with his fingers.

FOURTH COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Two, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of M.A., a child under the age of 13 years.

FIFTH COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Three, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of **M.A.**, a child under the age of 13 years, with his fingers.

SIXTH COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, penetrated the vagina of **M.A.**, a child under the age of 13 years, with his tongue.

SEVENTH COUNT

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, on an occasion other than that referred to in Count Two and Count Four, between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, had carnal knowledge of **M.A.**, a child under the age of 13 years.

EIGHTH COUNT

Representative Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) and (1) (a) of the Crimes Act, 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI between the 1st day of June 2015 to the 31st of August 2015, at Naiqarakoka Settlement, Tailevu in the Central Division, unlawfully and indecently assaulted **M.A.**, by forcefully putting her hand on his penis.

- [2] You pleaded guilty to count six and not guilty to the remaining 7 charges.
- [3] Court was satisfied that you fully understood the nature of the charge contained in count six and the consequences of your guilty plea for the said count. Court found that you pleaded guilty on your own free will and free from any influence.
- [4] Thereafter, the State filed the Summary of Facts in respect of count six. The Summary of Facts were read out and explained to you and having understood you agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of count six in the Amended Information, and found the said count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you on count six as charged.
- [5] The Summary of Facts filed by the State in respect of count six reads as follows:

"Brief Background

The accused person is Aminisitai, 67 years old Naiqarakoka Settlement of Tailevu, the complainant is M.A., who was 11 years old and was a class 5 student of Nailaga District School in 2015. The accused is the victim's paternal grandfather.

Offence

Between the 1st day of June to the 31st of August 2015, the accused was at the plantation near the creek and he saw the complainant. He waved at the complainant as he wanted her to come towards him.

When he got her attention, she then went towards the plantation, where he then told her to remove her panty. It was after she removed her panty, he then penetrated the complainant's vagina with his tongue.

The accused has pleaded guilty to Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009."

- [6] The ensuing trial in respect of the remaining 7 charges was held over a period of 9 days. At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you guilty of all the remaining 7 charges. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors in respect of counts 1-5 and count 8 and found you guilty and convicted you of the said charges. Having reviewed the evidence, this Court was of the opinion that the unanimous decision of the Assessors in finding you guilty in respect of count 7 to be perverse. Accordingly, this Court found you not guilty and acquitted you of the said charge.

- [7] The prosecution, in support of their case, called the complainant, MA, and her paternal grandmother, Ane Radovi. The prosecution also tendered the Birth Certificate of the complainant as Prosecution Exhibit PE1.
- [8] You are the paternal grandfather of the complainant. The complainant was only 8 years old at the time of the alleged incident in 2012 (Count 1), and 11 years old between 1 June 2015 and 31 August 2015 (Counts 2-8) (her date of birth being 8 December 2003), and as such, she was a juvenile.
- [9] The complainant clearly testified in Court of what you had done to her in the year 2012, when she was in class 2. She also testified to the events which took place between 1 June 2015 and 31 August 2015.
- [10] In terms of the Victim Impact Assessment Report filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. She is nervous, scared, ashamed, has no self-confidence and her self-esteem is very low.
- [11] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [12] The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 ("Crimes Act") carries a maximum penalty of imprisonment for life.
- [13] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of *Mohammed Kasim v. The State* [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

"....It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage."

- [14] In the case of *State v. Marawa* [2004] FJHC 338; HAC 16T of 2003S (23 April 2004); His Lordship Justice Anthony Gates stated:

"Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences".

"A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public's disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly

the sentence is set in order to protect women from such crimes: Roberts and Roberts (1982) 4 Cr. App R(S) 8; The State v Lasaro Turagabeci and Others (unreported) Suva High Court Crim. Case No. HAC0008.1996S."

[15] In *The State v Lasaro Turagabeci and Others* (supra) Pain J had said:

"The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences."

[16] His Lordship Justice Daniel Goundar, in the case of *State v. AV* [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

"...Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults on children. Children are our future. The Courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences".

[17] In the case of *State v. Tauvoli* [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

"Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and the Courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound."

[18] In the case of *Anand Abhay Raj v. The State* [2014] FJSC 12; CAV 03 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

[19] In determining the starting point within the said tariff, the Court of Appeal, in *Laisasa Koroivuki v. State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years imprisonment for the second count of Rape.

[21] The aggravating factors are as follows:

- (i) You are the paternal grandfather of the complainant. Being her grandfather, you should have protected her. Instead you have breached the trust expected from you and the breach was gross
- (ii) There was a large disparity in age between you and the complainant. The complainant was merely 8 years of age at the time you first committed these offences on her. At the time you were 61 years of age. Therefore, there was a difference in age of 53 years.
- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (iv) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- (v) The impact of the crime on the victim has been traumatic and is continuing.
- (vi) There is evidence to indicate that some of these abuses were pre planned by you.
- (vii) The acts committed by you had caused the complainant physical pain.
- (viii) You are now convicted of multiple offending. You have abused and raped the complainant over a long period of time. As pointed out by the State, the complainant was subjected to a campaign of rape.

[22] You are now 67 years of age, and residing at Nadali Village in Nausori. You are said to be a cane cutter earning \$200 per fortnight. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

- [23] As per the Antecedent Report filed it was submitted by the State that there are four active previous convictions recorded against you. Since you did not admit to the said previous convictions, the State has filed the Affidavit of Acting Inspector of Police Rakesh Mani, Acting Officer In-charge of the Criminal Records and Finger Print Office in Suva. IP Mani is based at the Forensics Science Services Headquarters Nasova, Suva.
- [24] IP Mani deposes that, on 2 October 2018, at the Forensic Science Services Criminal Records and Finger Print Office in Nasova, the finger prints of Aminisital Navunivesi (CRO No. F/6627) were retrieved from the archives. As per the above records, your date of birth is 7 June 1951. The finger prints of the above records were used and compared with the criminal matter pending before the Suva High Court – HAC 318 of 2015, which is the case against you. As a result of examining the finger prints, IP Mani has concluded that the finger prints are identical and that all the said finger prints belong to you.
- [25] IP Mani has further deposed that this comparison and identification was also verified by W/CPL 3346 Pritika Lekai, who is also a finger print expert.
- [26] Therefore, this Court cannot consider you as a person of previous good character and as such I am not in a position to offer you any concession in this regard.
- [27] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Your sentence is now 15 years imprisonment for count 2.
- [28] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentences at 10 years imprisonment for the remaining counts of Rape (Counts 3, 4, 5 and 6).
- [29] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentences by a further 5 years in respect of each of those counts. Your sentence is now 15 years imprisonment for counts 3, 4, 5 and 6.
- [30] You pleaded guilty to count 6 during the course of the trial. For this guilty plea, I grant you a discount of 2 years from your sentence for count 6. Accordingly, your sentence for count 6 would be 13 years imprisonment.
- [31] You have been convicted of one count of Sexual Assault in terms of Section 210(1) (a) of the Crimes Act (Count 8)).
- [32] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [33] In the cases of *State v. Abdul Khaiyum* [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012) and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.

[34] It was held in *State v Laca* (supra) "The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks."

"A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.

Category 2

- (i) Contact between the naked genitalia of the offender and another part of the victim's body;
- (ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;
- (iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

[35] In this case it has been proven that you forcefully put the complainant's hand on your penis. In my opinion, this would clearly come under category 2 above. As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years imprisonment for the offence of Sexual Assault, in terms of Section 210 (1) of the Crimes Act.

[36] Considering the aggravating factors aforementioned, I increase your sentence by a further 5 years. Now your sentence is 7 years imprisonment. Accordingly, I sentence you to 7 years imprisonment for the offence of Sexual Assault (Count 8).

[37] You have been convicted of one count of Indecently Annoying Any Person contrary to Section 213(1) of the Crimes Act (Count 1).

[38] The offence of Indecently Annoying Any Person in terms of Section 213(1) of the Crimes Act carries a maximum penalty of one year imprisonment.

[39] In the case of *State v Yabakiono* [2016] FJHC 383; HAC 77.2014 (9 May 2016); His Lordship Justice Madigan observed: *"The maximum penalty for indecently annoying another is imprisonment for one year without a tariff having been set; nor need there be one. There are a myriad ways in which a person can be sexually harassed and the sentence will be at the discretion of the court hearing the matter."*

[40] Accordingly, for count 1, I sentence you to 10 months imprisonment.

[41] In the circumstances, your sentences are as follows:

Count 1 - Indecently Annoying Any Person contrary to Section 213(1) of the Crimes Act – 10 months imprisonment.

Count 2 - Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act – 15 years imprisonment.

Count 3 - Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act – 15 years imprisonment.

Count 4 - Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act – 15 years imprisonment.

Count 5 - Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act – 15 years imprisonment.

Count 6 - Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act – 13 years imprisonment.

Count 8 - Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 7 years imprisonment.

I order that all seven sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 15 years.

[42] Accordingly, I sentence you to a term of 15 years imprisonment.

[43] The next issue for consideration is whether this Court should grant you any concessions due to your advanced age.

[44] In *State v. Spowart* [2013] FJHC 352; HAC 89 of 2011 (24 July 2013), His Lordship Justice Madigan had sentenced a 74 year old man to a term of imprisonment of 5 years, with a non-parole period of 4 years, for the Rape of a 5 year old girl.

[45] Similarly in *State v. Banuve* [2016] FJHC 320; HAC 183 of 2015 (25 April 2016), His Lordship Justice Aluthge sentenced a 72 year old man to a term of imprisonment of 8 years, with a non-parole period of 5 years, for the Rape of an 8 year old girl.

[46] Having perused the said authorities, I am of the opinion that the said two cases must be distinguished from the present case. This is due to the fact that in both those cases the accused had entered a guilty plea at the first available opportunity, thereby showing genuine remorse and, more importantly, relieving the complainants in the said cases from giving evidence in Court.

[47] In *State vs. Cati* [2016] FJHC 705; HAC 224 of 2015 (5 August 2016), His Lordship Justice Perera in sentencing a 74 year old man to 10 years imprisonment with a non-parole period of 6 years, for the causing the Rape of a 4 year old girl, held as follows:

"It stands to reason that a term of imprisonment will bring you immense hardship given your old age and your impaired hearing. However, the harm you have done to the victim and to her future is not outweighed by the hardship you may endure in serving a prison term. The victim who is 8 years old now will suffer throughout her remaining lifetime due to your shameful conduct."

[48] Her Ladyship Madam Justice Nazhat Shameem in the case of *Rokota v. The State* [2002] FJHC 168; HAA 68J of 2002S (23 August 2002) (supra) held as follows:

"...However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character."

[49] Making reference to Principles of Sentencing (2nd Edition), by D. A. Thomas, Her Ladyship said:

"Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released."

[50] Considering all the facts and circumstances of this case, especially the fact that the victim herself was merely 8 years of age at the time you began to abuse her and also since you are her grandfather, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

[51] Accordingly, I sentence you to a term of 15 years imprisonment.

[52] However, in determining the non-parole period to be imposed on you, I have given due consideration to your advanced age. Accordingly, pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 11 years imprisonment.

[53] In doing so I have taken into consideration the judgement of the Court of Appeal in **Tora v. State** [2015] FJCA 20; AAU 63 of 2011 (27 February 2015), which was upheld by the Supreme Court in **Tora v. State** [2015] FJSC 23; CAV 11 of 2015 (22 October 2015).

[54] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[55] You have been in remand custody for this case from 24 September 2015 to 17 March 2016, when you were granted bail by this Court. Thereafter, you have been in remand custody since 25 September 2018, the day on which I delivered the Judgment in this case. Accordingly, you have been in custody for a total period of about 6 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 6 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.


[56] In the result, you are sentenced to a term of imprisonment of 15 years with a non-parole period of 11 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 14 years and 6 months.

Non-parole period - 10 years and 6 months.

[57] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 5th Day of October 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.